Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

COLT INDUSTRIES OPERATING CORPORATION
INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS
FOR SALARIED EMPLOYEES,
Petitioner,

v.

GEORGE E. HENGLEIN *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether substantive ERISA disclosure requirements apply to benefit accrual decisions completed before the effective date of ERISA, when the participant first becomes eligible for and seeks plan benefits after the effective date of ERISA?

PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioner is the Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees (the Informal Plan). The Informal Plan is not a corporation and has no stock. The corporate successor to the sponsor of the Informal Plan is the B.F. Goodrich Company, a publicly traded company. Goodrich may have a financial interest in the outcome of this appeal in that the Informal Plan may seek funding from Goodrich. Sanford C. Bernstein & Co., Inc., owns more than 10% of Goodrich's stock.

Respondents are George W. Henglein, L.C. Albacker, R.B. Andrews, R.L. Appeldorn, R.H. Ashenbaugh, A.L. Austin, J.W. Bagosi, J.D. Balser, A. Barrasso, J.O. Bauer, E.E. Best, H.W. Bigleman, C.R. Blazier, J.P. Bressanelli, G.D. Brown, F.C. Buchholz, E.C. Calvin, R.R. Campbell, P.D. Castellano, J.L. Cerasi, E. Chapman, S. Christy, T.M. Costello, C.A. Dauka, A.J. Decosta, M.G. Degrande, A.S. Diciccio, A.P. Demarzio, C.J. Dimarzio, R.J. Dougherty, J.K. Douglas, M. Druga, E.P. Erath, E.P. Fahnert, H. Farrington, M. Ferlaino, R.D. Feydo, E.R. Finger, J.N. Flara, N.E. Frederick, J.P. Frenn, R.E. Fronko, L.L. Gibbs, W.L. Gleason, L.E. Gordon, R.W. Gott, J.E. Grimm, P.E. Grubbs, E.R. Guerra, A.J. Gulutz, J.T. Haaf, J.D. Hamacher, Jr., P.J. Hannon, R.M. Hansen, M.I. Harpham, D.H. Heldman, J.K. Hile, R.S. Hogsett, R.T. Hopper, H.M. Howell, W.M. Hyams, K.M. Janke, C.L. Jobe, K.H. Johns, R.O. Johnson, Jr., E.T. Jones, R. Kao, D.P. Kerr, Jr., P.A. Keys, R.W. Knallay, E.E. Knapek, W.J. Kofalt, S.W. Kohler, T. Kominitsky, T.R. Krupa, P.R. Kullen, J.R. Kundick, W. Lake, D.F. Laneve, T.T. Lehmann, R.H. Lewis, R.A. Lippert, W.R. Livingston, J.H. Lutton, A.J. Lynn, D.B. Mcclain, J.L. Mckain, P.F. Mcnicol, E.L. Marsh, F.S. Matsukas, H.J. Mercer, A.R. Middleton, M. Mitrovich, M.A. Molchan, R.A. Montgomery, R.T. Morelli, A.N. Morrison, H. Mraunac, M.R. Muckian,

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OPINIONS BELOW

The District Court's opinion is unreported. App. 1a. The opinion of the Court of Appeals is reported at 260 F.3d 201 (3d Cir. 2001). App. 100a.

JURISDICTIONAL BASIS

The Court of Appeals issued its opinion on August 10, 2001. App. 100a. On August 22, 2001, plaintiffs filed a timely petition for rehearing before the panel. App. 124a. On October 23, 2001, the panel denied that petition. App. 130a. The instant petition for certiorari is timely, in that Petitioner has filed it within 90 days of October 23, 2001.

This Court has jurisdiction of this petition pursuant to 28 U.S.C. § 1254(1), in that Petitioner seeks review of a final opinion of the United States Court of Appeals for the Third Circuit.

STATUTES INVOLVED

29 U.S.C. § 1144 provides, in pertinent part:

> **(a) Supersedure; effective date.** Except as provided in subsection (b) of this section, the provisions of this title and Title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect January 1, 1975.
>
> **(b) Construction and application.** (1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

STATEMENT OF THE CASE

In 1947, Crucible Steel Corp. of America (Crucible) established a formal pension plan for its salaried workers. App. 22a. In 1957, Crucible rewrote the pension plan and named it the Restated Employees' Retirement Plan of Crucible Steel Company of America, Inc. (the 1957 Plan).

In 1962, Crucible adopted an informal plan (the Informal Plan) for severance benefits for certain salaried employees. App. 22a. In 1968, Crucible rewrote the 1962 plan. App. 23a. The purpose of these plans was to allow terminated employees to defer receiving a pension under the 1957 Plan until age 65, when they could receive their full pension benefit without actuarial reduction. In the meantime, the 1968 Informal Plan would pay them an equivalent benefit, which would terminate upon commencement of a pension under the 1957 Plan.

Later in 1968, Crucible became a wholly owned subsidiary of Colt Industries. In 1969, Colt replaced the 1968 Informal Plan with Hardship Retirement Guidelines (the 1969 Informal Plan). App. 24a. The 1969 Informal Plan assumed eligible persons would take early retirement under the 1957 Plan, accepting the actuarial reduction. The 1969 Informal Plan would pay them some or all of the actuarial reduction for the rest of their lives.

As the Court of Appeals held, App. 64a-65a, both versions of the Informal Plan calculated benefits based on the benefit formula in the 1957 Plan. The key components of that formula were the employee's years of service with Crucible and the average salary during the last ten years of service.

In 1972, Crucible decided on a third approach to plant shutdown benefits: to provide them through § 5.3 of the new Crucible Inc. Retirement Plan for Salaried Employees (the 1972 Formal Plan), which replaced the 1957 Plan. Some years later, the Internal Revenue Service declined to approve § 5.3.

At the Crucible directors meeting on December 1, 1972, the board voted to adopt the 1972 Formal Plan to replace the 1957 Plan. App. 25a. Because the 1972 Formal Plan dealt with plant shutdowns, the board also decided to eliminate the Informal Plan. The resolution provided:

> [E]ffective as of December 1, 1972 the Hardship Retirement Guidelines and the Hardship Disability Retirement Guidelines adopted by the Board of Directors on May 16, 1969 be, and they hereby are, rescinded and of no further effect except with respect to individuals who are receiving benefits under either of such Guidelines on December 1, 1972.

In its findings of fact, the District Court held that this resolution constituted "all corporate action required under and by the applicable corporation law and its by-laws to

effectuate a recision [sic]" of the Informal Plan. App. 26a ¶ 50. The District Court further held that:

- Neither the Crucible board nor the Colt board ever took any action to undo the December 1, 1972 resolution.
- Neither board ever established any separate plan to provide benefits to salaried workers in the event of plant shutdown.
- After December 1, 1972, Crucible never intended to establish any separate plan to provide benefits to salaried workers in the event of plant shutdown.

App. 26a. Respondents have never challenged any of these findings.

In 1982, Colt decided to close the Crucible facility at which plaintiffs were employed. Because Crucible had eliminated the Informal Plan in 1972, no benefits were paid to these plaintiffs under it. In September 1986, plaintiffs sued the Informal Plan, claiming entitlement to benefits. The District Court held that the December 1, 1972 resolutions had terminated the existence of the Informal Plan and entered judgment against plaintiffs.

On appeal, the Third Circuit held that the existence of the plan depended on "'whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits.'" *Henglein v. Informal Plan for Shutdown Benefits for Salaried Employees*, 974 F.2d 391 (3d Cir. 1992) (*Henglein I*), *quoting Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982). *Henglein I* held that, in determining the "surrounding circumstances," the District Court had to consider events both before and after the effective date of ERISA, because the plan sponsor's history of representations "straddles the enactment of ERISA." 974 F.2d at 398-99. The Third Circuit therefore reversed and remanded for further proceedings.

On remand, the District Court twice found that the Informal Plan did not exist. Each time, the Third Circuit reversed. *Henglein v. Informal Plan for Plant Shutdown Benefits for Salaried Employees*, No. 93-3219 (3d Cir. 1993) (*Henglein II*); *Henglein v. Informal Plan for Plant Shutdown Benefits for Salaried Employees*, No. 94-3074 (3d Cir. 1994) (*Henglein III*).

On remand from *Henglein III*, the District Court found that the Informal Plan did exist as of the date of plaintiffs' termination. App. 96a ¶ 230. It found that those plaintiffs who had filed timely claims were entitled to benefits under either the 1968 or 1969 versions of the Informal Plan. App. 79a. ¶ 55. The District Court found that the Retirement Board created under the 1957 Plan was the fiduciary responsible for the Informal Plan. App. 74a ¶ 32. The District Court directed that fiduciary to calculate the benefits due to the prevailing plaintiffs. App. 79a.

The Retirement Board calculated benefits based on each participant's years of service as of December 1, 1972, and his average salary over the previous ten years. The reason was the District Court's factual findings that, in December 1972, Crucible had taken all action required by the then-applicable law to rescind the Informal Plan; did not thereafter intend to maintain a separate plan for such benefits; and did not thereafter refer in writing to any such plan. App. 26a ¶ 50; 27a ¶ 53; 28a ¶ 60. The Retirement Board concluded that this evidence established the plan sponsor's intent that no further benefits accrue under the Informal Plan after December 1, 1972.

Plaintiffs objected to this calculation, claiming that they had continued to accrue benefits after December 1, 1972. The District Court did not dispute the Retirement Board's finding that the plan sponsor did not intend further benefit accruals after that date. Nor did it dispute the sufficiency of the Crucible board's resolution to accomplish that result.

Instead, the District Court held that the prior rulings about the effect of that resolution on the ***existence*** of the Informal Plan also controlled the ***terms and conditions*** of that plan.

Quoting *Henglein III*, the District Court held that "the termination of the 1969 plan by an unpublished board resolution would have no effect on the employee's reliance on either the 1968 or 1969 plan." App. 96a. The District Court also quoted that portion of its original opinion finding that the Informal Plan continued to exist and to provide benefits. App. 96a. The District Court concluded that the December 1, 1972 resolution "did not cut off the plaintiffs' additional benefits accruing thereafter." App. 96a. It ordered the Retirement Board to recalculate benefits based on the participants' average salary and years of service when their employment terminated, at least ten years after the 1972 resolution legally terminating the Informal Plan.

On appeal, the Informal Plan explained that the existence of the Informal Plan is a question separate from the benefits it provided. *Henglein I* directed the District Court to consider post-ERISA events in determining the continued ***existence*** of the Informal Plan. It said nothing about whether ERISA governed the calculation of benefits under such a plan if it did exist.

Whether plaintiffs accrued further benefits after December 1, 1972 depends on the applicable law as of December 1, 1972. The District Court found that the resolution complied with all applicable state law as of that date. Unlike ERISA, the federal law in effect in 1972 did not require "disclosure of the circumstances under which benefits may be terminated." *Kolentus v. Avco Corp.*, 798 F.2d 949, 960 (7th Cir. 1986), *cert. denied*, 479 U.S. 1032 (1987). In holding that the resolution was ineffective to prevent accrual of further benefits, the District Court effectively held that ERISA retroactively applied to benefit decisions legally and validly made before the effective date of ERISA.

The Court of Appeals affirmed on this issue. It held that the Informal Plan's argument "simply reiterate the points unsuccessfully advanced in *Henglein I*, *Henglein II*, and *Henglein III*," so the plan sponsor's "surreptitious attempts to revise . . . the benefit plans" were unavailing. App. 122a. The Court of Appeals did not discuss the difference between the existence of the Informal Plan and the terms of that Plan.

ARGUMENT

I. THERE IS A SUBSTANTIAL AND PERSISTENT CIRCUIT SPLIT ON THE LAW APPLICABLE TO A POST-ERISA CLAIM FOR BENEFITS, WHEN THE OPERATIVE FACTS OCCURRED PRE-ERISA.

This case presents a common, oft-repeated fact scenario. The operative events—here the December 1, 1972 resolutions terminating further benefit accruals—occur before the effective date of ERISA; but the participants first claim benefits after the effective date of ERISA. The question is what law governs the pre-ERISA acts. Two circuits apply ERISA to pre-ERISA conduct, while five circuits apply state law. In two other circuits, the result is unclear. In *McMonagle v. Northeast Women's Center, Inc.*, 493 U.S. 901 (1989) (White, J., dissenting from denial of certiorari), Justice White urged that "[t]his conflict should be resolved."

The Third and Fourth Circuits both explicitly apply substantive ERISA standards to pre-ERISA conduct. *Tanzillo v. Local 617, Int'l Bhd. Of Teamsters*, 769 F.2d 140, 144-45 (3d Cir. 1985); *Rodrigues v. MEBA Pension Trust*, 872 F.2d 69, 73 (4th Cir.), *cert. denied*, 493 U.S. 872 (1989). This line of authority does not rest on any analysis of the language of the statute. Rather, it rests on pragmatic policy concerns:

- It serves the policy goal of extending ERISA's protection.

- It has the advantage of certainty; a court need only look at the date of denial of benefits to decide if ERISA applies.
- It is more equitable to plan participants who cannot be expected to inquire about benefits until retirement.

Rodrigues, 872 F.2d at 72.

In *Rodrigues*, the plan amended its rules in 1968 to offer pensioners who returned to work an option: continue receiving pension payments while accruing no more benefits, or accruing further benefits at the price of suspending pension payments. In 1986, plaintiff asserted that he had earned additional benefits, even though he had not suspended his pension payments after he returned to work. The Fourth Circuit found for the plaintiff because the plan had failed to provide adequate notice of the option. The Fourth Circuit held that "ERISA provides specific disclosure requirements" that "require plan participants and beneficiaries to be apprised of any 'material modification in the terms of the plan.'" 872 F.2d at 73. The purpose of these ERISA requirements was "to ensure that plan participants would receive *effective* notice of any plan changes that might affect their pension rights." *Id.* at 74 (citations and internal punctuation omitted) (emphasis original).

The First, Second, Sixth, Ninth and Eleventh Circuits have held that ERISA does not govern pre-ERISA conduct. *Quinn v. Country Club Soda Co.*, 639 F.2d 838, 841 (1st Cir. 1981); *Lamontagne v. United Wire, Metal & Machine Pension Fund*, 869 F.2d 153, 156 (2d Cir.), *cert. denied*, 493 U.S. 818 (1989); *Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund*, 979 F.2d 444, 452-53 (6th Cir. 1992); *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1504-05 (9th Cir. 1984); *Burks v. American Cast Iron Pipe Co.*, 212 F.3d 1333, 1337 (11th Cir. 2000), *cert. denied*, 531 U.S. 1074 (2001).

These Circuits specifically disclaim the proposition that the "pre-1975 conduct of a plan's trustees would be judged by ERISA standards so long as the participant applied for and was refused benefits after 1975." *Stevens*, 979 F.2d at 453. Rather, these Circuits rely on the plain language of ERISA's preemption clause, which does not apply to "any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. § 1144(b)(1):

> The clear practical import of the act or omission clause is to prevent past conduct of pension plan fiduciaries and contributors from being judged retroactively under the standards established by ERISA simply because the conduct generates consequences subsequent to the ERISA effective date that give rise to what is, technically, an independent "cause of action."

Quinn, 639 F.2d at 841.

Most courts following this line of authority find that state law controls the legal effects of pre-ERISA conduct. In *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir.), *cert. denied*, 524 U.S. 923 (1998), plaintiffs asserted that they were entitled to lifetime medical benefits based on statements in summary plan descriptions furnished to them before the date that ERISA required plans to furnish such descriptions:

> We could not hold GM liable for violations of a statutory requirement based on actions taken prior to the effective date of that requirement. If the plaintiffs have any cause of action based on GM's pre-1977 summaries, it is probably not one based on ERISA.

133 F.2d at 400.

In *Burks*, plaintiffs claimed they were entitled to free medical care and prescription drugs for life. The basis for this claim was a summary plan description and various alleged oral representations made to them before their retirement. All plaintiffs retired before ERISA was enacted.

The District Court held that ERISA preempted all of their claims and entered summary judgment against them. The Eleventh Circuit reversed:

> ERISA cannot apply retroactively to govern the rights and responsibilities that attached to the Plan before ERISA's effective date. . . . [T]he district court erred by applying ERISA substantive law retroactively to pre-1975 responsibilities. Accordingly, we remand for the district court to consider whether, under the law applicable to welfare benefit plans when the plaintiffs retired, Cast Iron promised to cover 100% of the plaintiffs' drug expenses . . . .

212 F.3d at 1337.

The Fifth and Seventh Circuits apply federal common law to pre-ERISA events. *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 973 (5th Cir. 1981); *Reiherzer v. Shannon*, 581 F.2d 1266, 1272 (7th Cir. 1978). Exactly what that common law consists of is unclear. *Stevens* reads *Woodfork* as adopting the *Tanzillo-Rodrigues* rule "expanding ERISA preemption." 979 F.2d at 451. District Courts in the Seventh Circuit have lamented that "Seventh Circuit law appears incomplete and inconsistent." *Hohenegger v. Northern Indiana Public Service Co.*, 967 F. Supp. 350, 352 (N.D. Ind. 1997).

Had the Third Circuit applied the rule announced in *Burks* and *Sprague* to the instant case, it would have reached the opposite result. As the District Court held, and as plaintiffs have never disputed, the December 1, 1972 resolutions were all the action necessary to stop the accrual of further benefits under the then-applicable law. App. 26a.

This is precisely the sort of circuit conflict that this Court ought to resolve. It has been around for two decades and it shows no signs of resolving itself without this Court's intervention. Moreover, this is an area in which much future litigation is all but certain to occur.

FASB 106 requires employers to account for the cost of future medical benefits to retired workers on their financial statements. Those accounting requirements have a substantial adverse effect on most companies' bottom lines. *See Wise v. El Paso Nat. Gas Co.*, 986 F.2d 929, 932 and n.3 (5th Cir. 1993). Thus, there are powerful financial incentives to companies to reduce or eliminate the medical benefits they provide to retirees. *Burks*, *Sprague* and *Hohenegger* illustrate the retirees' response to such cost-cutting measures. In many if not most of these cases, pre-ERISA events will be critical to the resolution of the retirees' claims.

CONCLUSION

For these reasons, the Informal Plan respectfully prays that the Court grant the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,

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